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No. 76-1186

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEON A. COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks to set aside his conviction for filing a false offer in compromise of tax liability because the trial court ruled that if petitioner testified, the government would be permitted to prove that he had been convicted of mail fraud and securities violations.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of filing a false offer in compromise of tax liability, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to two years' imprisonment (C.T. 659).[1] The court of appeals affirmed (Pet. App. 41-47). The evidence showed that on February 13, 1970, petitioner, who was more than $150,000

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[1] "C.T." refers to the clerk's transcript. "Tr." refers to the trial transcript. "S.R." refers to the supplemental record on appeal.

delinquent in federal income tax payments, submitted an offer in compromise form to the Internal Revenue Service, certifying that it was true, correct, and complete. Petitioner stated on that form that he had "no assets" (Pet. App. 43). Petitioner also filed a Statement of Financial Condition "as of" January 30, 1970, which was attached to his offer in compromise. Neither document disclosed that petitioner had in his possession three checks payable to him dated February 5, 1970, in the total amount of $30,000.

1. Petitioner argues (Pet. 15-26) that the trial court abused its discretion in ruling that if petitioner testified in his own defense, the government could introduce evidence of his prior conviction for mail fraud and securities violations for impeachment purposes under Rule 609(b) of the Federal Rules of Evidence (see Pet. 4).[2] Prior to the promulgation of the Federal Rules of Evidence, a defendant's prior convictions could be used against him for impeachment purposes. *McGautha* v. *California*, 402 U.S. 183, 215. The use of such evidence was within the discretion of the trial judge. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168 (C.A. 5); *United States* v. *Smith*, 420 F. 2d 428 (C.A. 5). Rule 609(a) provides that evidence of a prior conviction shall be admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, and the court determines that the probative value of the evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment. However, Rule 609(b) provides that evidence of a prior conviction more than ten years old is not admissible, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

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[2]Petitioner did not testify in his own defense.

An examination of the circumstances of this case shows that the trial court did not abuse its discretion in ruling that evidence of petitioner's prior conviction for mail fraud and securities violations would be admissible. In 1959, petitioner was charged in a 20-count indictment in connection with a stock fraud. He pleaded guilty to two counts of mail fraud and securities violations and was imprisoned from April 1961 to May 1962. This case arises out of the tax assessment of $150,000 on the profits of petitioner's stock fraud. The offer in compromise at issue here involved the unpaid taxes on income realized by petitioner from his securities fraud. Thus, there was a close factual connection between petitioner's prior conviction and the false documents he submitted to the Internal Revenue Service.

In ruling that the evidence of his prior conviction would be admissible, the trial court took into account that both crimes in this case involved dishonesty (Tr. 60). As the court of appeals correctly pointed out (Pet. App. 45-46), the factors considered by the trial court related to the probative value of the prior conviction as impeachment evidence. Since petitioner's prior offense involved dishonesty, the jury was entitled to consider the fact of petitioner's prior conviction in determining his credibility, if he chose to testify in his own defense.

Petitioner argues (Pet. 20-26) that the trial judge did not comply with Rule 609(b) because he failed to make specific findings on the record as to the prejudicial impact the evidence might have. But as the court of appeals pointed out, "[s]ince the court had the Rule before it when it made the determination * * * the finding of the district court can be interpreted as concluding that the usefulness of the past criminal conviction substantially outweighed the possible prejudice" (Pet. App. 46). The court of appeals further stated that "[s]ufficient evidence in the record indicates that

the trial judge made a thorough and thoughtful analysis of the issue and based his conclusion upon various factors which were then before him" (*ibid.*). Thus, the court of appeals was "satisifed that the district court acted within the confines of the Rule and did not abuse its discretion in admitting the prior conviction" (*ibid.*).

2. Petitioner further argues (Pet. 26-30) that the prosecution misled him as to the nature of the charge contained in the superseding indictment. Late in 1974, petitioner was charged in a five-count indictment with crimes against the revenue. The fifth count charged that in connection with an "offer in compromise," dated February 13, 1970, petitioner had made and subscribed a false statement on an accompanying "Statement of Financial Condition," which was dated as of January 30, 1970, in that he did not disclose "$30,000 in funds comprising a part of certain Federal Reserve Bank Drafts" (S.R. 6-7). On June 26, 1975, 11 days before the trial commenced, a second indictment was obtained which covered essentially the same subject matter as the fifth count of the original indictment with respect to the February 13, 1970, offer in compromise, but which omitted reference to the date of the Statement of Financial Condition (C.T. 539). Prior to trial, the first four counts were dismissed on the government's motion (Tr. 3-4) and petitioner was tried only on the charge of filing a false offer in compromise.

It is undisputed that on June 26, 1975, the date on which the new indictment was returned, a copy of that indictment, together with a copy of the government's motions to dismiss and consolidate, were served personally upon petitioner's counsel (C.T. 540; Tr. 500). The motion explained that the new indictment "contained some clarifying language with respect to the date of the offense" (C.T. 541). The court of appeals (Pet. App. 44) correctly concluded that "[t]here is

no indication that there was any secret or surprise involved in the substitution." Sufficient time remained before trial to complete preparation of the defense to the charge as amended. In these circumstances, petitioner was not prejudicially surprised by the superceding indictment.

3. Finally, petitioner urges (Pet. 31-38) that there was a fatal variance between the crime charged and the crime proved. This contention appears based upon the assumption that his statement in the offer in compromise that he had no assets related back to January 30, 1970, before petitioner received the $30,000 in checks. But as the court of appeals pointed out (Pet. App. 43-44), petitioner's offer in compromise was dated February 13, 1970, after he received the checks. Thus, his statement on the form that he had no assets plainly was false. The indictment alleged February 13, 1970, to be the date of the false statement (C.T. 539; Tr. 472-473). There was no variance between the indictment and the evidence.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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